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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re) Case No. 10-42260-E-13

CHAND K. SINGH,

Debtor(s).)

CHAND K. SINGH,

Adv. Pro. No. 11-2049
Docket Control No. CJO-1

Plaintiff(s),)

U.S. BANK; MORTGAGE)

U.S. BANK; MORTGAGE
ELECTRONIC INFORMATION
SYSTEMS, INC.; CENTRAL
MORTGAGE COMPANY; and
WILLIAM G. MALCOLM,

Defendant(s).)

MEMORANDUM OPINION AND DECISION

Defendants Central Mortgage Company, Mortgage Electronic Registration Systems, Inc., and William G. Malcolm (hereinafter, "Defendants") seek to dismiss this adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b) (6) as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.

In relevant part, Defendants argue that:

(1) The complaint fails to specify which defendant committed the allegedly wrongful acts;

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- 1 (2) The first cause of action, for declaratory relief, fails
2 because there was no violation of the automatic stay;
- 3 (3) The second cause of action, for violation of the
4 automatic stay pursuant to 11 U.S.C. § 362(a), fails
5 because there was no violation of the automatic stay;
- 6 (4) The third cause of action, for violation of the automatic
7 stay pursuant to 11 U.S.C. § 362(k)(1), fails because
8 there was no violation of the automatic stay;
- 9 (5) The fourth cause of action, for violation of the Real
10 Estate Settlement Procedures Act ("RESPA"), fails because
11 there is no private cause of action under 12 U.S.C.
12 § 2604; and,
- 13 (6) The fifth cause of action, for civil conspiracy, fails
14 because Plaintiff-Debtor has not alleged an underlying
15 tort or actual conspiracy.

16 The court's decision is to grant the Motion as to Mortgage
17 Electronic Systems, Inc., and William G. Malcolm as to all causes
18 of actions and claims. The court grants the Motion as to the
19 Second and Third Causes of Action (Violation of Automatic Stay and
20 Damages), the Fourth Cause of Action (RESPA Claims), and the Fifth
21 Cause of Action (Civil Conspiracy), and denies the Motion as to the
22 First Cause of Action (Declaratory Relief) for Central Mortgage
23 Company.

FACTS AS ALLEGED

24 Downey Savings and Loan Association, FA ("Downey") entered
25 into a loan with Plaintiff-Debtor on February 25, 2005.¹
26 Plaintiff-Debtor asserts that Downey "did specify service of the
27 loan to Mortgage Electronic Information Systems, Inc. ("MERS"), as
28

¹/ Dckt. 1 at 4.

29 The facts "stated" in this decision are as alleged in the
30 pleadings. The court does not make any factual findings as to
31 the facts underlying the claims in this adversary proceeding.

1 recorded on January 3, 2006.² The note was allegedly assigned to
 2 Central Mortgage Company on an unspecified date. Defendant Central
 3 Mortgage Company filed a proof of claim on September 1, 2010, in
 4 the secured amount of \$469,000.26.³ The proof of claim stated that
 5 fourteen (14) pre-petition mortgage payments were listed as past
 6 due, from July 2009 to August 2010, totaling \$24,635.90. The
 7 Plaintiff-Debtor filed her Chapter 13 bankruptcy case on August 20,
 8 2010.⁴ The Plaintiff-Debtor filed her initial Chapter 13 plan on
 9 the same date.⁵ The initial Plan proposed to pay Central Mortgage
 10 Company's secured claim as a Class 1 with a monthly contract
 11 installment of \$1,621.00, identified a monthly late charge of
 12 \$100.00, listed a pre-petition arrearage of \$24,000.00, provided an
 13 interest rate of 0.00% for the arrearage, and set a monthly
 14 dividend of \$450.00 beginning in the fourth month to repay the
 15 arrearage.⁶ On September 3, 2010, Central Mortgage Company filed
 16 a Notice of Change of Mortgage Payment, which increased the
 17 mortgage payment to \$2,566.11, effective October 1, 2010.⁷ In
 18 relevant part, the Notice provided:

19 [P]lease be advised that the customer's first lien
 20 mortgage payment will change from \$1,621.25 to \$2,566.11
 21 effective October 1, 2010 because of recent escrow
 analysis. The payment is broken down as \$1,102.22
 Principal/Interest and \$1,463.89 escrow. Please advise

22
 23 ² *Id.*

24 ³ Proof of Claim No. 2, Bankr. E.D. Cal. No. 10-42260-E-
 25 13L.

26 ⁴ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 1

27 ⁵ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 5.

28 ⁶ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 5 at '2, 5.

⁷ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 14.

your client of the change. We will notify the Trustee's office as well.⁸

No objections to the plan were filed within the period specified in the Notice of the Commencement of Case.⁹ Subsequently, the court confirmed the plan on October 20, 2010.¹⁰ The Plaintiff-Debtor filed a first modified plan on March 18, 2011,¹¹ and a motion to confirm on the same date.¹² The first modified plan did not provide for the change in mortgage payments as requested by Central Mortgage Company.

THE COMPLAINT

Plaintiff-Debtor filed this adversary proceeding on January 21, 2011. Dckt. 1, "Complaint." The Complaint seeks (1) declaratory relief and injunctive as to the rights and obligations of the respective parties to this adversary proceeding, including a statement of the amount of contractual payments due, an accounting, and a detailed analysis of pre-petition and post-petition escrow shortages, *Id.* at 9; (2) Money damages for violation of the automatic stay of 11 U.S.C. § 362(a), *Id.* at 10; (3) Money damages for violation of the automatic stay pursuant to 11 U.S.C. § 362(k)(1), *Id.* at 11-12; (4) Money damages for violation of the RESPA, *Id.* at 12-14; and (5) Money Damages for civil conspiracy, *Id.* at 14-16. The court will consider each of the foregoing claims in turn.

8 *Id.*

⁹ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 9.

¹⁰ Dckt. 19.

¹¹ Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 35.

¹² Bankr. E.D. Cal No. 10-42260-E-13L, Dckt. 26.

1 In considering a motion to dismiss, it is necessary to
2 identify what has actually been alleged by the Plaintiff-Debtor and
3 against whom. Starting with the causes of action and working
4 outward to the general allegations is appropriate in the Adversary
5 Proceeding.

6 **First Cause of Action**

7 The First Cause of Action is for declaratory relief against
8 the "Defendants" collectively. No specific person or persons are
9 identified as having a dispute with the Plaintiff-Debtor. It is
10 alleged that there is a dispute concerning the amount of the post-
11 petition monthly payments to be made by the Plaintiff-Debtor on the
12 Downey Note. Specifically, it is alleged that a dispute exists
13 concerning the computation of amounts properly included for escrow
14 advances made by the creditor pre-petition and post-petition.

15 There is a further allegation that a "controversy exists" and
16 that an injunction should be issued, restitution should be ordered,
17 and the court determine that the unnamed defendants' conduct was
18 "willful[,] malicious[, and] purposely completed to maximize ...
19 shareholder wealth." *Id.* ¶ 47.

20 The general allegations in the Complaint assert that Central
21 Mortgage Company filed a proof of claim in the Plaintiff-Debtor's
22 bankruptcy case stating that it was the assignee of the Downey Note
23 and Deed of Trust. *Id.* ¶¶ 17, 18, 25. The proof of claim included
24 the arrearage for fourteen pre-petition mortgage payments, title
25 fees, attorneys' fees, and publication fees. *Id.* ¶¶ 29, 30. In
26 the bankruptcy case, Central Mortgage Company filed a notice of
27 change in post-petition monthly payment on the Downey Note.
28 *Id.* ¶ 32. Plaintiff-Debtor then asserts that an unnamed Defendant

1 generated a post-petition escrow account disclosure statement which
2 increased, from the \$1,621.25 amount, the post-petition payments on
3 the Downey Note to \$2,566.11. *Id.* ¶¶ 25, 29. However, the
4 Complaint does assert that it was Central Mortgage Company which
5 communicated the increase in the post-petition monthly payments on
6 the Downey Note. *Id.* ¶ 32.

7 From these allegations, the only named Defendant who appears
8 to be the subject of these allegations to determine the correct
9 amount of the post-petition monthly payments on the Downey Note is
10 Central Mortgage Company. This is consistent with Central Mortgage
11 Company having filed a proof of claim asserting the right to be
12 paid on the Downey Note.

13 **Second and Third Causes of Action**

14 It is alleged that unnamed Defendants had knowledge of the
15 bankruptcy and automatic stay, and the unnamed Defendants conducted
16 a post-petition escrow analysis for the obligation owed by the
17 Plaintiff-Debtor on the Downey Note. *Id.* ¶¶ 49, 52. The unnamed
18 Defendants conducted the analysis so as to include the pre-petition
19 arrearage and thereby increased the post-petition monthly payments
20 to include repayment of the pre-petition arrearage which was
21 otherwise provided for in the Chapter 13 Plan. *Id.* ¶¶ 52, 53. The
22 unnamed Defendants issued a notice of a post-petition monthly
23 payment increase to the Chapter 13 Trustee for the purpose of
24 obtaining payment of the pre-petition arrearage through post-
25 petition monthly mortgage payments from the Plaintiff-Debtor.
26 *Id.* ¶¶ 54, 55, 56. It is further alleged that this conduct was
27 done intentionally, violated the automatic stay, and that the
28 Plaintiff-Debtor has suffered damages identified as increased post-

1 petition monthly payment on the Downey Note, attorneys' fees, and
2 unidentified emotional distress. *Id.* ¶¶ 57, 59, 63, 64, 65, 66,
3 67.

4 Considering the allegations in the Complaint, the only person
5 identified as having engaged in any of the alleged improper conduct
6 is Central Mortgage Company.

7 **Fourth Cause of Action**

8 The Plaintiff-Debtor asserts that the Downey Note is part of
9 a loan transaction subject to RESPA. It is alleged that upon the
10 assignment, sale or transfer or change in servicer for the Downey
11 Note, unnamed Defendants were required to notify Plaintiff-Debtor
12 not less than 15 days before the transfer of the loan. *Id.* ¶¶ 71,
13 72, 73. It is alleged that this notice was not given by unnamed
14 Defendants. *Id.* ¶¶ 74, 75, 76. Plaintiff-Debtor concludes that
15 unnamed Defendants have violated RESPA. It appears that the
16 identity of the unnamed Defendant for the RESPA Cause of Action is
17 Central Mortgage Company.

18 **Fifth Cause of Action**

19 The Plaintiff-Debtor alleges that unnamed Defendants engaged
20 in conduct to recoup pre-petition claims (the pre-petition
21 arrearage due on the Downey Note attributable to escrow amounts)
22 from post-petition property of the bankruptcy estate. This
23 recoupment was obtained by improperly increasing the post-petition
24 monthly payments on the Downey Note. *Id.* ¶ 85. It asserted that
25 unnamed Defendants conspired to do this and gave notice of the
26 post-petition monthly payment on the Downey Note (including payment
27 of the pre-petition arrearage) knowing that the Chapter 13 Trustee
28 would collect the increase monthly payment from the Plaintiff-

1 Debtor. *Id.* ¶ 87. It is alleged that the unnamed Defendants
2 assisted unnamed assignees or successors of unidentified
3 instruments in unstated ways of concealing the collection of
4 unidentified pre-petition arrearage through increased post-petition
5 payments. Further, an unnamed defendant knows the source of the
6 decision making process for this conspiracy and has a duty to
7 counsel the various unnamed Defendants as to the automatic stay
8 provisions. *Id.* ¶¶ 90, 91, 93, 94.

ANALYSIS

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits, and a complaint should not be dismissed unless it appears beyond doubt that the Plaintiff-Debtor can prove no set of facts in support of her claim which would entitle her to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss will be granted should be resolved in favor of the plaintiff. *Pond v. Gen. Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

22 The complaint must provide more than labels and conclusions,
23 or a formulaic recitation of a cause of action; it must plead
24 factual allegations sufficient to raise more than a speculative
25 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
26 (2007). Federal Rule of Civil Procedure 8, made applicable to this
27 adversary proceeding by Federal Rule of Bankruptcy Procedure 7008,
28 requires that complaints contain a short, plain statement of the

1 claim showing entitlement to relief and a demand for the relief
 2 requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell*
 3 *Atlantic*, the pleading standard under Rule 8 does not require
 4 "detailed factual allegations," but it does demand more than an
 5 unadorned accusation or conclusion of a cause of action. *Id.* at
 6 555.

7 To survive a motion to dismiss, a complaint must contain
 8 sufficient factual matter, accepted as true, to state a
 9 claim to relief that is plausible on its face. A claim
 10 has facial plausibility when the plaintiff pleads factual
 content that allows the court to draw the reasonable
 inference that the defendant is liable for the misconduct
 alleged.

11 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 173 L. Ed.
 12 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8
 13 also requires that allegations be "simple, concise, and direct."
 14 Fed. R. Civ. P. 8(d)(1).

15 In ruling on a 12(b)(6) motion to dismiss, the Court may
 16 consider "allegations contained in the pleadings, exhibits attached
 17 to the complaint, and matters properly subject to judicial notice."
 18 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court
 19 need not accept unreasonable inferences or conclusory deductions of
 20 fact cast in the form of factual allegations. *Sprewell v. Golden*
 21 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the
 22 court required to "accept legal conclusions cast in the form of
 23 factual allegations if those conclusions cannot be reasonably drawn
 24 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d
 25 752, 754-55 (9th Cir. 1994).

26
**27 CLAIMS ARE NOT ASSERTED AGAINST THE NON-CENTRAL
 MORTGAGE COMPANY DEFENDANTS**

28 In the Complaint, the Plaintiff-Debtor makes broad sweeping

1 allegations of conduct against unidentified "Defendants" or
2 "Defendant." All but Central Mortgage Company are alleged to have
3 held an interest in the Note sometime in the past or provided loan
4 servicing, but only Central Mortgage Company is alleged to have
5 asserted any rights or interest in the Note in this bankruptcy
6 case. Merely alleging that someone was involved in a conspiracy
7 does not make them responsible for the conduct of a defendant
8 alleged to have engaged in the improper conduct.

9 As to the first four causes of action, the only Defendant
10 alleged to have engaged in the conduct at issue is Central Mortgage
11 Company. Plaintiff-Debtor's argument that "due to the complexity
12 of the software/computer systems employed by the Defendant(s),
13 Plaintiff-Debtor is unable to point with specificity which
14 Defendant engaged in what specific conduct" is not persuasive here.
15 No plausible claims are stated against the non-Central Mortgage
16 Company Defendants. Rather, it appears that the Plaintiff-Debtor
17 is attempting to wrap them into this action by alleging a civil
18 conspiracy.

19 The Plaintiff-Debtor fails to assert any plausible claims
20 against Mortgage Electronic Registration System, Inc. and
21 William G. Malcolm in the first four causes of action: Declaratory
22 Relief, Violation of Automatic Stay, Violation of 11 U.S.C.
23 § 362(k), and Violation of RESPA. All of the alleged misconduct is
24 that of Central Mortgage Company in this bankruptcy case. No
25 misconduct is identified to either of these two other Defendants,
26 and they appear to be swept into the first four causes of action
27 solely by the Plaintiff-Debtor making her allegations against a
28 generic "Defendant" or "Defendants."

No plausible claims having been pled against Mortgage Electronic Registration System, Inc. or William G. Malcolm, the first four causes of action are dismissed as to each of these two Defendants, without prejudice and with leave to amend.

DECLARATORY RELIEF

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 744 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentriftt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

18 The court may only grant declaratory relief where there is an
19 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*
20 *Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be
21 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
22 227, 240-41 (1937). Defendants argue that Plaintiff-Debtor has
23 failed to set out any facts demonstrating that a RESPA Notice was
24 generated to collect pre-petition claims. However, in reading the
25 complaint in the light most favorable to the Plaintiff-Debtor, the
26 Complaint does state that Central Mortgage Company conducted an
27 escrow analysis, that the escrow analysis caused pre-petition
28 escrow shortfalls to be included in post-petition payments, and

1 that Plaintiff-Debtor and Chapter 13 Trustee were notified of this
2 improper increased amount so that such amount would be paid post-
3 petition to Central Mortgage Company.

4 From a fair reading of the Complaint it is clear that
5 Plaintiff-Debtor alleges that a dispute exists between Central
6 Mortgage Company and Plaintiff-Debtor concerning the correct amount
7 of the post-petition installments which are properly due on the
8 secured claim. The request for declaratory relief is not
9 duplicative of other causes of action. Only after the court
10 determines the correct amount of the post-petition payments will
11 the Plaintiff-Debtor, Central Mortgage Company, and the Chapter 13
12 Trustee know the correct amount to be paid monthly.

13 To the extent that the Plaintiff-Debtor is seeking injunctive
14 relief, restitution, or other adjudication of rights in the First
15 Cause of Action, such are improper as part of this declaratory
16 relief claim. To the extent that a "dispute" exists as to whether
17 any of the Defendants have violated rights of the Plaintiff-Debtor,
18 then the appropriate action may be commenced asserting those rights
19 and damages which may be recoverable. Plaintiff-Debtor has not
20 pled claims for the additional relief, but has merely added those
21 words to the relief requested. The court will not - and cannot -
22 issue a precursory or advisory opinion as to other rights or
23 interests the Plaintiff-Debtor may or may not have against any of
24 the Defendants.

25 The Motion is denied as to the claim for Declaratory Relief
26 against Central Mortgage Company with respect to the issue of the
27 correct amount of the post-petition monthly installment payments
28 and the amount of the pre-petition claim, and granted as to Central

1 Mortgage Company for any other relief requested in the First Cause
2 of Action and all claims in the First Cause of Action against
3 Mortgage Electronic Registration Systems, Inc. and William G.
4 Malcolm, without prejudice and with leave to amend.

5 **VIOLATION OF THE AUTOMATIC STAY**

6 The Plaintiff-Debtor maintains that the conduct of Central
7 Mortgage Company in recalculating and increasing the post-petition
8 payments violated the automatic stay. The Plaintiff-Debtor alleges
9 that Central Mortgage Company asserts the claim in this case and
10 seeks to obtain payment on the obligation evidenced by the Note.

11 Defendants argue that the second and third causes of action,
12 for violation of the automatic stay, fail because as a matter of
13 law, the Defendants have not violated the automatic stay.
14 Defendants also assert that the complaint fails to properly allege
15 facts which demonstrate a violation of the automatic stay.
16 Defendants contend that the issuance of the RESPA Notice cannot
17 violate the automatic stay and cite a number of cases in support of
18 this assertion. See *Zotow v. Johnson (In re Zotow)*, 432 B.R. 252,
19 261 (B.A.P. 9th Cir. 2010); *Colo. E. Bank & Trust v. McCarthy (In*
20 *re McCarthy)*, 421 B.R. 550, 565 (Bankr. D. Colo. 2009); *Cousins v.*
21 *CitiFinancial Mortg. Co. (In re Cousins)*, 404 B.R. 281, 287 (Bankr.
22 S.D. Ohio 2009); *Pultz v. NovaStar Mortg., Inc. (In re Pultz)*, 400
23 B.R. 185, 190-91 (Bankr. D. Ma. 2008); *Connor v. Countrywide Bank,*
24 *N.A. (In re Connor)*, 366 B.R. 133, 138 (Bankr. D. Haw. 2007); *Chase*
25 *Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309, 314 (S.D. Fla.
26 2001); *In re Draper*, 237 B.R. 502, 505 (Bankr. M.D. Fla. 1999).

27 Central Mortgage Company places great reliance on the
28 Bankruptcy Appellate Panel decision in *Zotow, supra*. In *Zotow*, BAC

1 Home Loan Servicing, LP ("BAC") sent one post-petition notice to
2 the debtors showing an increase in the post-petition monthly
3 mortgage payment. It was further alleged that BAC received several
4 payments from the Chapter 13 trustee at the increased amount.

5 The *Zotow* court first considered the decision of the Fifth
6 Circuit Court of Appeals in *Campbell v. Countrywide Home Loans,*
7 Inc., 545 F.3d 348 (5th Cir. 2008). In *Campbell*, the Fifth Circuit
8 Court of Appeals concluded that the automatic stay precluded
9 Countrywide Home Loans, Inc. ("Countrywide") from attempting to
10 obtain payment on the pre-petition arrearage other than as
11 permitted by the Bankruptcy Code. The obligation owing for a pre-
12 petition arrearage, even if the claim is subject to the anti-
13 modification provision of 11 U.S.C. § 1325(b)(2), is a pre-petition
14 claim subject to the automatic stay provisions of 11 U.S.C.
15 § 362(a). *Campbell*, 545 F.3d at 354. However, the only conduct by
16 Countrywide in *Campbell* was filing a proof of claim stating the
17 higher installment amount. Filing a proof of claim, even one which
18 grossly overstates the claim, was not held to be a violation of the
19 automatic stay. *Id.* at 356.

20 The Third Circuit Court of Appeals has also addressed this
21 issue in *In re Rodriguez*, 629 F.3d. 136 (3rd Cir. 2010). In
22 *Rodriguez*, Countrywide increased the post-petition installments to
23 recover a pre-petition escrow arrearage. *Id.* at 143-144. After
24 the bankruptcy case was filed, Countrywide issued a revised escrow
25 analysis and demand for payment to the debtors. The Third Circuit
26 Court of Appeals concluded that the pre-petition arrearage was part
27 of the pre-petition claim which was governed by the Bankruptcy
28 Code. *Id.* at 142. Countrywide was entitled to be paid the pre-

1 petition arrearage portion of its claim, but Countrywide could not
2 violate the automatic stay to obtain payment of the pre-petition
3 arrearage. *Id.* at 142-143. The Third Circuit concluded that an
4 attempt to obtain payment of a pre-petition arrearage outside the
5 plan payment could be a violation of the stay. *Id.* The matter was
6 remanded to the trial court to determine if the violation was
7 willful to support an award of damages pursuant to 11 U.S.C.
8 § 362(k). This decision in *Rodriguez* was issued after the
9 Bankruptcy Appellate Panel's decision in *Zotow*.

10 The Panel in *Zotow* considered the scope of the automatic stay
11 with respect to communications relating to pre-petition claims.
12 Not every communication is prohibited. Rather, prohibited
13 communications are those which, based on direct or circumstantial
14 evidence, are geared toward collection of pre-petition debt, and
15 which are accompanied by coercion or harassment. *Zotow*, 432 B.R.
16 at 259. Relying on *Morgan Guarantee Trust Company Of New York v.*
17 *American Savings and Loan Association*, 804 F.2d 1487 (9th Cir.
18 1986), the Panel concluded that a mere request for payment and
19 informational statement are permissible communications which do not
20 violate the automatic stay. *Id.* at 1491. The Bankruptcy Appellate
21 Panel also recognizes that whether a communication is a permissible
22 or prohibited one is a fact-driven inquiry which makes any bright
23 line test unworkable. *Zotow*, 432 B.R. at 258.

24 In *Morgan Guarantee Trust Company Of New York v. American*
25 *Savings and Loan Association*, the Ninth Circuit addressed the issue
26 of whether the presentment of a note issued by Johns Manville
27
28

1 violated the automatic stay.¹³ Because the automatic stay seeks to
 2 ensure the orderly administration of the debtor's estate, provide
 3 a breathing spell for the debtor, maintain the status quo, and
 4 prevent harassment of a debtor by sophisticated creditors, a
 5 request for payment (as with the presentment of a negotiable
 6 instrument) does not violate the automatic stay unless it is
 7 accompanied by coercion or harassment, such as immediately or
 8 potentially threatening the debtor's possession of property.
 9 *Morgan*, 804 F.2d at 1491. Examples of communications cited by the
 10 Ninth Circuit as violating the automatic stay included: (1) notice
 11 of intent to terminate lease, (2) notice of intent to terminate
 12 franchise, (3) notice of medical clinic refusal to provide future
 13 medical services because of refusal to pay for prior services,
 14 (4) letter informing debtor that an attorney had been hired to
 15 collect a delinquent account, (5) college refusing to release
 16 transcripts as a method to force payment, and (6) a creditor who
 17 made repeated visits and telephone calls to a debtor. *Id.* Examples
 18 of communications not violating the automatic stay included:
 19 (1) letter sent to debtor's attorney that a credit union would not
 20 have further business dealings with the debtor unless debt was
 21 reaffirmed, and (2) communications setting out the basis of the
 22 claim (informal proof of claim). *Id.*

23 The *Zotow* court concluded that the stay had not been violated
 24 on the facts of that case because Countrywide sent a single notice
 25 which did not request payment. The one notice communicated the
 26 information obtained in the recent escrow analysis computed by
 27

28 ¹³/ This case predated the amendment to 11 U.S.C.
 § 362(b)(10) which exempts presentment of a negotiable instrument
 from the automatic stay.

1 Countrywide. The record established at the evidentiary hearing
2 revealed no indication that Countrywide attempted to collect the
3 pre-petition arrearage outside the bankruptcy court. The Panel
4 placed significant weight on there being only a single notice sent
5 to the debtor. Given that there was one notice, no other action
6 taken to obtain payment, and undisputed facts which did not
7 constitute harassment or coercion, the Panel concluded that the
8 single notice did not violate the automatic stay.

9 Applying both the spirit and letter of *Morgan Guarantee Trust*
10 *Company Of New York v. American Savings and Loan Association*,
11 creditors and debtors are allowed to communicate their disparate
12 positions and rights they seek to assert. It is when coercion or
13 harassment is coupled with the communication that they can be in
14 violation of the automatic stay.

15 In this case, the Plaintiff-Debtor argues that the calculation
16 itself, in addition to the filing of the notice of change in
17 mortgage payment, violates the automatic stay. It is asserted that
18 filing the notice of change in mortgage payment will result in the
19 Chapter 13 Trustee forcing the Plaintiff-Debtor to pay the pre-
20 petition arrearage as a post-petition mortgage installment rather
21 than as a proper plan payment. However, the Plaintiff-Debtor
22 alleges nothing more to indicate that there was any harassing or
23 coercive conduct by Central Mortgage Company. Merely that it
24 asserted the right to a higher post-petition payment based upon its
25 interpretation of RESPA.

26 With respect to Central Mortgage Company (the court having
27 identified Central Mortgage Company as the only potential defendant
28 being referenced under the Second and Third Causes of Action), the

1 Plaintiff-Debtor makes generic broad sweeping allegations of a
2 pattern of conduct in which Central Mortgage Company attempted to
3 obtain payment on a pre-petition claim outside the strictures of
4 the Bankruptcy Code. But the specific allegations in this case are
5 that Central Mortgage Company communicated to the Plaintiff-Debtor,
6 Chapter 13 Trustee, and everyone else in the case that Central
7 Mortgage Company computed an increase in the post-petition
8 payments. At best, the Plaintiff-Debtor argues that she knew the
9 Chapter 13 Trustee could seek to dismiss the case if she failed to
10 pay an undisputed post-petition mortgage payment or assert her
11 contention as to the correct amount.

12 Glaring in its absence in the Complaint are any allegations
13 contending that Central Mortgage Company, either directly or
14 indirectly, threatened or harassed the Plaintiff-Debtor. Commonly
15 in the context of consumer harassment one sees multiple phone
16 calls, multiple letters, and other communications stating that
17 adverse consequences will occur if the consumer does not
18 immediately comply with the demands made by the creditor. In this
19 case, nothing is alleged. Plaintiff-Debtor merely alleges that
20 Central Mortgage provided notice that it computed a post-petition
21 installment payment increase and the Plaintiff-Debtor did not
22 object to the increased payment.

23 The court also rejects Plaintiff-Debtor's apparent contention
24 that she has no obligation to address disputes concerning the
25 proper post-petition payment amounts to be made for Class 1 or
26 Class 2 Claims, or the correct determination of a creditor's pre-
27 petition arrearage to be paid through the Chapter 13 Plan.
28 Plaintiff-Debtor appears to have adopted a strategy that rather

1 than addressing such issues as part of confirming or enforcing her
 2 Chapter 13 plan, she can elect instead to sue the creditor alleging
 3 a violation of the automatic stay and seek monetary recovery.

4 Plaintiff-Debtor has the option of choosing to file a
 5 Chapter 13 reorganization or Chapter 7 liquidation. Choosing a
 6 reorganization necessarily entails much more significant emotional,
 7 financial, and time commitments than filing a Chapter 7 and
 8 proceeding directly to a fresh start. However, a properly
 9 prosecuted Chapter 13 case can yield significant economic benefit
 10 for debtors. In many cases debtors "strip" junior liens from their
 11 residence and cure the arrearage on the senior lien, thereby saving
 12 their home and realizing future appreciation without paying the
 13 junior liens.

14 In this setting, it is not unreasonable for a Chapter 13
 15 debtor, advancing the interests of the estate and the debtor, to
 16 address a pre-petition claim dispute consisting of the correct
 17 computation of the post-petition payment. This includes
 18 determining the correct amount of the pre-petition arrearage to be
 19 paid through the plan. A debtor has many different devices in his
 20 or her legal arsenal, including filing a claim for the creditor,
 21 objecting to a claim, obtaining a determination of a plan term as
 22 part of a confirmation hearing, supplemental proceedings in
 23 enforcement of a plan,¹⁴ and a declaratory relief action. To the
 24 extent that there exists a contractual attorneys' fees provision,

25
 26 ¹⁴/ 11 U.S.C. § 1327(a) provides, "The provisions of a
 27 confirmed plan bind the debtor and each creditor,..., and whether
 28 or not such creditor has objected to, has accepted, or has
 rejected the plan." This is the new "contract" to be enforced
 between the parties. *Max Recovery v. Than (In re Than)* 215 B.R.
 430 435 (B.A.P. 9th Cir. 1997).

1 presumably a prevailing debtor would seek to recover attorneys'
2 fees and costs for the benefit of the estate and other creditors.

3 Though creditors' counsel may argue that the present type of
4 situation arises because a debtor fails to communicate with the
5 creditor, the court is cognizant of the realities of modern home-
6 loan debt servicing. The persons computing the current post-
7 petition mortgage payments are typically separate from the
8 bankruptcy group and the attorney - if any - attempting to
9 represent the creditor in the bankruptcy case. Whether because of
10 the volume of defaulted home loans or a conscious management
11 decision. A thoughtful response to a debtor's dispute of a
12 mortgage payment or arrearage calculation often does not occur
13 until the creditor and counsel are forced to a court hearing.

14 Central Mortgage Company's argument that RESPA creates a free-
15 floating exemption from the automatic stay for however it computes
16 and seeks payment of post-petition mortgage installments is as
17 unpersuasive with this court as that argument has been with the
18 courts in *Rodriguez* and *Campbell*. While the Bankruptcy Code does
19 not prohibit adjustments for post-petition changes authorized by
20 RESPA, the automatic stay provisions of 11 U.S.C. §362(a) prohibit
21 the collection of pre-petition debts outside of the bankruptcy.
22 Had Congress intended to exempt only demands for payment cloaked in
23 RESPA from the automatic stay it would have said so in a clear and
24 unambiguous manner. Congress knows how to make an exception to the
25 automatic stay, see 11 U.S.C. § 362(b), and the court will not
26 imply that Congress gave Central Mortgage Company and other
27 servicers or note owners free reign to do whatever they desire to
28 obtain payment on pre-petition claims without regard to the

1 || Bankruptcy Code.

2 The motion to dismiss the Second and Third Causes of Action¹⁵
3 for violation of the automatic stay against Central Mortgage
4 Company, Mortgage Electronic Registration Systems, Inc., and
5 William G. Malcolm is granted, without prejudice and with leave to
6 amend.

REAL ESTATE SETTLEMENT PROCEDURES ACT

8 Plaintiff-Debtor further asserts that the Defendants have
9 violated RESPA by (1) failing to provide the transfer of servicing
10 notice, (2) improperly computing the monthly post-petition
11 installments, and (3) sending incorrect post-petition RESPA escrow
12 analyses to the Plaintiff-Debtor. As correctly stated by
13 Defendants, while a private right of action exists for the failure
14 to provide the servicing notice, the Plaintiff-Debtor must assert
15 a damages claim caused by the failure to provide the notice.
16 12 U.S.C. § 2605(f); *Wilson v. JPMorgan Chase Bank*, No. 2:09-863
17 WBS GGH 2010 WL 2574032, *9-10, 2010 U.S. Dist. LEXIS 63212, *26-27
18 (E.D. Cal. June 25, 2010). From a review of the Amended Complaint,
19 the Plaintiff-Debtor does not assert any damages arising from the
20 failure to provide the notices of change in servicer. The damages
21 that the Plaintiff-Debtor asserts are (1) payment of the increased
22 amounts to the Chapter 13 Trustee, (2) attorneys' fees in
23 connection with this action and the increased costs, and
24 (3) unstated emotional distress damages. These are not alleged to

¹⁵/ The Third Cause of Action asserts a "violation" of 11 U.S.C. § 362(k). Subparagraph (k) is a remedies provision for violation of the other provisions of § 362. The court reads the Second and Third Causes of Action as one claim for statutory damages under § 362(k), as opposed to a request for sanctions under 11 U.S.C. § 105 and the inherent powers of this court.

1 have anything to do with the alleged lack of notice.

2 Notices that the servicing of a loan has been transferred are
3 required pursuant to 12 U.S.C. § 2605(b), for the transferor, and
4 § 2605 (c), for the transferee. It is alleged that Central
5 Mortgage Company was the transferee of the Downey Note and that
6 unnamed Defendants (presumably Central Mortgage Company) did not
7 provide the required notice of transfer. Complaint ¶¶ 72, 73, 74,
8 75, 76. In the Memorandum of Points and Authorities, but not
9 stated in the Motion, Movants merely argue that no private right of
10 action is provided for a claim arising under 12 U.S.C. § 2604
11 (distribution of a special information booklet provided by the
12 Secretary of Housing and Urban Development). One could argue that
13 this response was caused by Plaintiff-Debtor having cited to 12
14 U.S.C. § 2604, rather than § 2605 which relates to the allegations
15 pled in paragraphs 73 - 76 of the Complaint.

16 Given the nonspecific pleadings, the court grants the motion,
17 without prejudice and with leave to amend. Central Mortgage
18 Company should not take the granting of the motion as authority to
19 base a motion on an obvious typographical error.

20 An additional RESPA claim has been asserted for the improper
21 calculation of post-petition installments. The Complaint is clear
22 that the only alleged conduct in asserting an increase in post-
23 petition installments has been by Central Mortgage Company.
24 However, as asserted by Defendants, no private right of action has
25 been identified or advanced by the Plaintiff-Debtor for a violation
26 of the limitation on a requirement of advance deposits in escrow
27 accounts. To the extent that one looks to 12 U.S.C. § 2609, titled
28 "Limitation on requirement of advance deposits in escrow accounts,"

1 the Secretary of Housing and Urban Development is given the
2 authority to issue civil penalties for violations of that section.
3 No provision is made for a private right of action, as Congress
4 stated in § 2605.

5 The Fourth Cause of Action is dismissed as to Central Mortgage
6 Company, Mortgage Electronic Registration Systems, Inc., and
7 William G. Malcolm without prejudice and with leave to amend.

8 CIVIL CONSPIRACY

9 To establish a civil conspiracy in California one must show
10 that Defendants jointly engaged in a tort. There is no separate
11 civil action for conspiracy to commit a tort without there being an
12 actual wrongful act committed. *Favila v. Katten Muchin Rosenman,*
13 *LLP*, 188 Cal. App. 4th 189, 206 (2010); see also 5 WITKIN SUMMARY OF
14 CALIFORNIA LAW TORTS, 10TH EDITION § 45. The effect of the "conspiracy"
15 is that each Defendant involved in the conspiracy has an
16 individually basis for liability. Through incorporating the
17 general allegation paragraphs and the RESPA cause of action
18 allegations, the general allegations of a conspiracy are generally
19 made as to unidentified Defendants.

20 The California District Court of Appeal in *Black v. Bank of*
21 *America*, 30 Cal. App. 4th 1 (1994), conducted the review of a
22 conspiracy claim and the proper basis for such a claim when the
23 parties involved were a corporation and the agents or employees of
24 the corporation. The *Black* Court concluded it is well established
25 California law that employees or agents of a corporation cannot
26 conspire with their principal or employer when acting in their
27 official capacity. *Id.* at 4. In *Gruenberg v. Aetna Ins. Co*, 9
28 Cal. 3d 566 (1973), the California Supreme Court concluded that an

1 insured could not state a conspiracy claim against his insurance
2 company and a separate insurance adjusting firm, a separate law
3 firm, and employees of the two separate firms because only the
4 insurance company had a duty of good faith and fair dealing with
5 the insured. *Id.* at 576. The two separate firms were not a party
6 to the insurance contract and did not have such a duty to the
7 Plaintiff-Debtor. *Id.* In its *Doctors' Co. v. Superior Court*
8 decision, the California Supreme Court held that an attorney and an
9 expert witness employed by an insurance company could not be held
10 liable for conspiring to violate the company's statutory duties,
11 again because the statutory duties were owed only by the insurance
12 companies. 49 Cal. 3d 39, 46 (1989).

13 In *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498 (1980), the
14 court rejected a conspiracy claim for constructive fraud alleged to
15 be based on a breach of fiduciary duty owed by a disability
16 insurer. The insurer's agents did not owe the plaintiff a
17 fiduciary duty, as only the insurer itself owed the fiduciary duty.
18 *Id.* at 510. However, the court allowed to stand a claim for
19 conspiracy to commit actual fraud, since even the agents owed a
20 duty to the plaintiff to abstain from injuring the plaintiff
21 through express misrepresentations, independent of the insurer's
22 implied covenant of good faith and fair dealing. *Id.* at 511.

23 This issue was further addressed by the California Supreme
24 Court in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.
25 4th 503 (1994). The California Supreme Court first distinguished
26 between alleged conspiracies arising out of tort claims and
27 contract claims. For contract claims, there is no tort obligation
28 for one contracting party not to interfere with the performance of

1 the contract. *Id.* at 584. There is merely a contractual obligation
 2 to perform as promised. *Id.* Therefore, a person who is not a
 3 party to a contract cannot be bootstrapped into a conspiracy tort.

4 *Id.*

5 For there to be a civil conspiracy there must be,
 6 the formation and operation of the conspiracy and damage
 7 resulting to plaintiff from an act or acts done in
 8 furtherance of the common design . . . In such an
 9 action the major significance of the conspiracy lies in
 10 the fact that it renders each participant in the wrongful
 11 act responsible as a joint tortfeasor for all damages
 12 ensuing from the wrong, irrespective of whether or not he
 13 was a direct actor and regardless of the degree of his
 14 activity.

15

16 *Id.* at 512. However, each of the actors must have a duty to the
 17 person alleging a conspiracy. The conspiracy is to have a co-
 18 conspirator do the act that breaches everyone's respective duties.

19 In this case, all of the operative allegations have been made
 20 against Central Mortgage Company for the remaining causes of action
 21 in this Adversary Proceeding for which the nonspecific conspiracy
 22 is alleged. The Plaintiff-Debtor only makes boilerplate
 23 allegations that other unnamed Defendants "conspired" for the
 24 "recouping of pre-petition claims from post-petition estate
 25 property resulting in systematic injury to debtors." *Id.* ¶ 85.
 26 Further, there is no allegation as to what duties, if any, that
 27 these unnamed Defendants owe to the Plaintiff-Debtor and the
 28 damages caused to them by the breach of those duties.

29 The court is also not persuaded by the general argument that
 30 all of these parties are participating in a chain of events which
 31 culminate with Central Mortgage Company intentionally miscomputing
 32 post-petition mortgage installments. Though this Plaintiff-Debtor
 33 and counsel are convinced that a grand conspiracy exists to demand

1 excessive payments based on the co-conspirators believing that
2 "nobody really cares because the debtor owes the money," this
3 Plaintiff-Debtor may pursue claims against identified defendants,
4 not merely a generic complaint where nobody is sure which
5 defendant may be liable under the various causes of action. A
6 complaint is not a free-floating pleading in which persons are
7 named, but the allegations against them to be specified at a later
8 date. In substance, for Defendants other than Central Mortgage
9 Company, the Plaintiff-Debtor argues that she needs to sue them
10 first, then conduct discovery against the various Defendants, and
11 finally subsequently figure out what claims, if any, she could have
12 against one or more of the Defendants. One does not commence
13 litigation against a defendant to conduct discovery to determine if
14 the plaintiff has any potential claims it could allege in good
15 faith against that defendant.

16 In her opposition, the Plaintiff-Debtor argues that each of
17 the named Defendants use the NewTrak system which improperly fails
18 to distinguish between pre-petition and post-petition escrow
19 arrearage. The opposition states that Plaintiff-Debtor has not
20 "explored through discovery" how this product is sold, but presumes
21 that it relates to her loan and the computation done by Central
22 Mortgage Company. Further, Plaintiff-Debtor argues that MERS and
23 others yet to be determined have failed to provide notices to her.
24 Therefore, presumably, she should be allowed to advance a
25 conspiracy theory against everyone.

26 This contention fails. The Plaintiff-Debtor has not alleged
27 what duty to this Plaintiff-Debtor owed by the non-Central Mortgage
28 Company Defendants has been breached. Further, the Plaintiff-

1 Debtor has not alleged the damages flowing from a breach of duty by
2 the non-Central Mortgage Company Defendants. At best, the
3 contention is that the Plaintiff-Debtor asserts that she does not
4 like what the other Defendants may do as part of their business
5 practices to other persons, and therefore seeks to recover damages
6 from them as part of a larger conspiracy of creditors and credit
7 providers against debtors in general. This does not sufficiently
8 state a conspiracy claim against any of the Defendants, including
9 Central Mortgage Company, the only party alleged to have engaged in
10 the complained of conduct with respect to this Plaintiff-Debtor.

11 The court dismisses the Fifth Cause of Action for conspiracy
12 as to all Defendants, without prejudice and with leave to amend.

13 **CONCLUSION**

14 The motion to dismiss is granted as to the First Cause of
15 Action (Declaratory Relief), the Second and Third Causes of Action
16 (11 U.S.C. § 362), Fourth Cause of Action (RESPA), and Fifth Cause
17 of Action (Conspiracy), which are all claims and causes of action
18 in the Complaint, for Mortgage Electronic Information Systems, Inc.
19 and William G. Malcolm. The Motion is denied as to the First Cause
20 of Action (Declaratory Relief), and granted as to the Second and
21 Third Causes of Action (11 U.S.C. § 362), Fourth Cause of Action
22 (RESPA), and Fifth Cause of Action (Conspiracy), which are all
23 other claims and causes of action in the Complaint, for Central
24 Mortgage Company. All dismissals are granted without prejudice and
25 with leave to amend.

26 The Plaintiff-Debtor shall file an amended complaint, if any,
27 on or before September 30, 2011. If no amended complaint is filed,
28 Central Mortgage Company shall file its answer on or before

1 October 20, 2011. If an amended complaint is filed, the named
2 Defendants shall file their responsive pleading on or before
3 October 20, 2011.

4 This Memorandum Opinion and Decision constitutes the court's
5 findings of fact and conclusions of law pursuant to Rule 52, Fed.
6 R. Civ. P. and Rule 7052, Fed. R. Bankr. P., and the court shall
7 issue a separate order consistent with this ruling.

8 Dated: September 15, 2011

9
10 RONALD H. SARGIS, Judge
11 United States Bankruptcy Court

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This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

Peter Macaluso
7311 Greenhaven Dr #100
Sacramento, CA 95831

Chand Singh
38 Caprice Ct
Sacramento, CA 95832

Christina O
2112 Business Center Dr 2nd Fl
Irvine, CA 92612

Robert McWhorter
915 L St #1000
Sacramento, CA 95814

Lawrence Loheit
PO Box 1858
Sacramento, CA 95812-1858

Office of the U.S. Trustee
Robert T Matsui United States Courthouse
501 I Street, Room 7-500
Sacramento, CA 95814